Lembaga Kemajuan Terengganu Tengah v Mendza Builders Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-01–695 OF 2010
LOW HOP BING, LINTON ALBERT AND ALIZATUL KHAIR JJCA
27 MARCH 2012

Arbitration — Award — Setting aside — Arbitration award registered as High Court judgment — Defendant applied to set aside award instead of challenging registration of award as judgment — Whether application correctly dismissed — Whether any evidence to show arbitrator committed misconduct in granting award

The respondent had carried out construction works for the appellant under a contract. A dispute concerning the respondent's claim on the works was referred to an arbitrator who found in favour of the respondent ('the award'). When the appellant refused to comply with the award, the respondent applied to the High Court and registered the award as a judgment of the court. The appellant refused to satisfy the judgment and instead filed an originating motion ('OM') in the High Court to set aside the award. The OM was dismissed with costs. Against that decision the appellant filed the instant appeal to the court of Appeal arguing that the arbitrator had committed misconduct in that the award was allegedly made without evidence and based on information or reasons not raised or pleaded before him. It was also contended that the arbitrator had failed to provide a 'case stated award' for the decision of the High Court pursuant to s 22(1) of the (then) Arbitration Act 1952.

Held, dismissing the appeal with costs and affirming the decision of the High Court:

(1) There was not an iota of evidence to suggest any misconduct on the part of the arbitrator. The argument that the arbitrator had made the award without any information or reason was unsustainable (see para 15).

(2) The complaint that the arbitrator failed to state a case for the High Court under s 22(1) was baseless. Under the first limb of s 22(1), the arbitrator had discretion whether or not to state an award or part of an award in the form of a special case for the decision of the High Court. He was not mandatorily obliged to do so (see para 14).

(3) The OM to set aside the award had been overtaken by events. The award had been registered as a judgment of the High Court. The appellant should have challenged the registration of the judgment but had chosen not to do so. The High Court had correctly dismissed the OM (see paras 16–17).

[Bahasa Malaysia summary

Responden telah menjalankan kerja-kerja pembinaan untuk perayu di bawah kontrak. Pertikaian berkaitan tuntutan responden ke atas kerja dirujuk kepada penimbang tara yang memutuskan memihak responden ('award'). Apabila perayu menolak untuk mematuhi award tersebut, responden memohon kepada Mahkamah Tinggi dan mendaftar award tersebut sebagai penghakiman mahkamah. Perayu menolak untuk mematuhi penghakiman dan sebaliknya memfailkan usul pemula ('UP') di Mahkamah Tinggi untuk mengenepikan award tersebut. UP tersebut ditolak dengan kos. Menentang keputusan tersebut perayu memfailkan rayuan ini kepada Mahkamah Rayuan dengan berhujah bahawa penimbang tara telah melakukan salah laku yang mana award tersebut dibuat tanpa keterangan dan berdasarkan atas maklumat atau alasan yang tidak dibangkitkan atau dipli di hadapannya. Ia juga dihujahkan bahawa penimbang tara gagal untuk memberikan 'case stated award' untuk keputusan Mahkamah Tinggi berikutan s 22(1) Akta Timbangtara 1952.

Diputuskan, menolak rayuan dengan kos dan mengesahkan keputusan Mahkamah Tinggi:

(1) Tidak terdapat sedikit pun keterangan untuk mencadangkan apa-apa salah laku oleh penimbang tara. Hujahan bahawa penimbang tara telah membuat award tanpa maklumat atau alasan adalah tidak mapan (lihat perenggan 15).

(2) Aduan bahawa penimbang tara gagal untuk menyatakan kes untuk Mahkamah Tinggi di bawah s 22(1) adalah tidak berasas. Di bawah bahagian pertama s 22(1), penimbang tara mempunyai budi bicara sama ada atau tidak untuk menyatakan award atau sebahagian daripada award dalam bentuk kes khusus untuk keputusan Mahkamah Tinggi. Beliau tidak secara mandatori diwajibkan untuk berbuat sedemikian (lihat perenggan 14).

(3) UP untuk mengenepikan award tersebut telah diambil alih oleh kejadian. Award telah didaftarkan sebagai penghakiman Mahkamah Tinggi. Perayu patut mencabar pendaftaran penghakiman tersebut tetapi memilih untuk tidak berbuat demikian. Mahkamah Tinggi secara betul menolak UP tersebut (lihat perenggan 16–17).]

Notes

For cases on setting aside, see 1(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1749–1820.

Cases referred to

Crystal Realty Sdn Bhd v Tenaga Insurance (M) Sdn Bhd [2008] 3 CLJ 791, CA (refd)

Ganda Edible Oils Sdn Bhd v Transgrain BV [1988] 1 MLJ 428; [1987] CLJ (Rep) 95, SC (refd)

Hartela Constractors Ltd v Hartecon JV Sdn Bhd & Anor [1999] 2 MLJ 481, CA (refd)

James Clark (Brush Materials), Limited v Carters (Merchants), Limited [1944] KB 566, KBD (refd)

Puri Construction Private Ltd v Union of India AIR 1989 SC 777, SC (refd)

Appeal from: Originating Motion No MT1–21–99 of 2008 (High Court, Shah Alam)

Legislation referred to

Arbitration Act 1952 (repealed by the Arbitration Act 2005) ss 17, 22(1), 24(2)

Stanley Chang (Stanley Chang & Partners) for the appellant.
Bastian Pius Vendargon (Bastlan Vendargon) for the respondent.

Low Hop Bing JCA (delivering judgment of the court):

APPEAL

[1] On 16 May 2008, an arbitrator's award ('the award') allowed the claim by Mendza Builders Sdn Bhd against Lembaga Kemajuan Terengganu Tengah.

[2] On 21 October 2010, Lembaga Kemajuan Terengganu Tengah (the appellant before us and the plaintiff in the High Court) ('the plaintiff') filed an originating motion ('the OM') seeking to set aside the award. The learned judge of the High Court had dismissed the OM with costs of RM5,000.

[3] The plaintiff has now brought this appeal before us.

FACTUAL BACKGROUND

[4] The parties' dispute concerned a construction claim which was referred to arbitration in 1985 ie some 25 years ago. Mendza Builders Sdn Bhd (the respondent before us and the defendant in the High Court) ('the defendant') did construction works for the plaintiff under a contract dated 13 February 1984 for new townships in Terengganu Tengah.

[5] Pursuant to an arbitration clause, the dispute was referred to the Institute of Engineers Malaysia and an arbitrator was duly appointed.

[6] Before the arbitrator could commence proceedings to record evidence,

the plaintiff applied to the High Court for security for costs. The matter went to the (then) Supreme Court. A few years later, the issue pertaining to security for costs was resolved.

[7] During the said 25 years, the plaintiff (the defendant before the arbitrator) made four applications to amend its defence and counterclaim. The arbitrator allowed three such applications but dismissed the fourth application which sought to plead fraud. The plaintiff then applied twice, unsuccessfully, to the High Court for a review of the arbitrator's decision in dismissing the fourth application. The plaintiff's appeal to the Court of Appeal was dismissed.

[8] When the arbitrator published the award, the plaintiff refused to comply with it. The defendant was left with no other alternative but to apply to the High Court for leave to register the award as a judgment of the High Court. The High Court allowed the defendant's application and the award was registered as a judgment.

[9] The plaintiff refused to satisfy the judgment, but had instead filed the OM praying for an order to set aside the award. The OM was heard and dismissed with costs of RM5,000. Hence, the instant appeal before us.

MISCONDUCT

[10] Learned counsel Mr Stanley Chang attributed misconduct to the arbitrator, alleging that the arbitrator had:

(a) failed to provide a 'case stated award' pursuant to s 22(1) of the (then) Arbitration Act 1952 which was the governing Act at the material time (a reference hereinafter to a section is a reference to that section in the (then) Arbitration Act 1952);

(b) in the absence of evidence, awarded a sum of RM3,996,652.50 under item 8.1(E) of the bills of quantities; and

(c) used information or reasons which are not based on the facts presented, raised and/or pleaded.

[11] The defendant's learned counsel Dato' Bastian Pius Vendargon submitted that the plaintiff's grounds are misconceived, as there was no misconduct on the part of the arbitrator and so the award should not be set aside.

[12] The question to be answered in this appeal may be stated as follows:

> Given the aforesaid factual background, could any misconduct be attributed to the arbitrator in order to set aside the award?

[13] We find it necessary to state the general principles governing the setting aside of an award of an arbitrator or arbitral tribunal, as follows:

(a) the court should approach an award in order to support it if it is reasonably possible, rather than destroy it by calling it illegal. The court shall presume, unless and until the contrary is shown, that an arbitrator or arbitral tribunal has by the award determined those matters which were referred to him: *Halsbury's Laws of England* Vol 2 at p 322 para 610; and *Puri Construction Private Ltd v Union of India* AIR 1989 SC 777;

(b) the effect of an award, when no contrary intention is expressed, is that every arbitration agreement is deemed to contain a provision that the award is to be final, and binding on the parties and any person claiming under them: *Halsbury's Laws of England ibid*, para 611; and s 17;

(c) the final award can only be set aside by the High Court on very limited circumstances eg an error of law on the face of it: *Crystal Realty Sdn Bhd v Tenaga Insurance (M) Sdn Bhd* [2008] 3 CLJ 791, per KN Segara JCA;

(d) an error of law on the face of the award must be such that it can be found in the award, or in a document actually incorporated with it, or that there is some legal proposition, which is the basis of the award, which is erroneous: *Halsbury 's, ibid*, at p 334 para 623 'Error of Law on the Face of Award', as adopted and applied by Syed Agil Barakbah SCJ of the (then) Supreme Court in *Ganda Edible Oils Sdn Bhd v Transgrain BV* [1988] 1 MLJ 428 at p 431; [1987] CLJ (Rep) 95 at p 99i (SC);

(e) the final award must be viewed in its totality, and any error of law on the face thereof must be one that is patent and obvious so as to render the award manifestly unlawful, and unconscionable to subsist, and thereby justifying it to be set aside;

(f) when an arbitrator or arbitral tribunal does not accept any submission made by counsel with regard to any proposition of law, such act or conduct does not infect the award with an error on its face to render the award wrong: *James Clark (Brush Materials), Limited v Carters (Merchants), Limited* [1944] KB 566 (KBD);

(g) section 24(2) provides for 'misconduct' as a ground for setting aside an award. However, the court should exercise great care and proper sense of responsibility when asked to set aside an arbitral award. It does not and should not sit in appeal and examine the correctness of the award on merits: *Hartela Constractors Ltd v Hartecon JV Sdn Bhd & Anor* [1999] 2 MLJ 481 (CA), per Gopal Sri Ram JCA (later FCJ).

[14] We shall now consider the merits of the OM. First, the plaintiff's complaint that under s 22(1), the arbitrator has failed to state a case for the High Court. We are of the view that this complaint is baseless. The statement of a case by an arbitrator is regulated by s 22(1) in the following words:

> 22 Statement of case
>
> (1) *An arbitrator may*, and *shall if so directed by the High Court, state* —
>
> (a) any question of law arising in the course of the reference; or
>
> (b) an award or any part of an award,
>
> in the form of a special case for the decision of the High Court. (Emphasis added.)

We note that under the first limb of s 22(1), the arbitrator has a discretion. The first limb clearly states that an arbitrator may state an award or part of an award in the form of a special case for the decision of the High Court. It is trite law that the word 'may' connotes that it is permissive, directory or discretionary, as opposed to the word 'shall' which imposes a mandatory obligation eg when the High Court directs an arbitrator to do so, pursuant to the second limb of s 22(1). The second limb is inapplicable in the instant appeal as there was no such direction by the High Court.

[15] Next, we are unable to sustain the plaintiff's argument that the arbitrator has made the award without any information or reason. In relation to the plaintiff's fourth application for amendment to the defence and counterclaim in order to plead fraud, we note that it was made some 25 years after the dispute had commenced. The true position is that the fourth application was not bona fide, but was designed to alter the character of the case after one quarter of a century. Clearly, it was frivolous. Moreover, we find not an iota of evidence to suggest any misconduct on the part of the arbitrator.

[16] Finally, the OM to set aside the award has now clearly been overtaken by events. The award had been registered as a judgment of the High Court. The plaintiff should have challenged the registration of the judgment but had chosen not to do so.

CONCLUSION

[17] On the foregoing grounds, we answer the above question in the negative. The learned judge of the High Court had correctly dismissed the OM. We hold that this appeal is completely devoid of merits, and is hereby dismissed with costs of RM50,000. Decision of the High Court is affirmed. Deposit to the defendant (the respondent) on account of the fixed costs.

Appeal dismissed with costs and decision of the High Court affirmed.

Reported by Ashok Kumar